

ORIGINAL



0000108662

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

COMMISSIONERS
KRISTIN K. MAYES - Chair
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

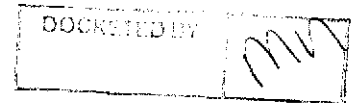
2010 MAR 24 P 1:03

Arizona Corporation Commission

AT CORP COMMISSION
DOCKET CONTROL

DOCKETED

MAR 24 2010



IN THE MATTER OF THE FORMAL)
COMPLAINT AGAINST TIME WARNER)
FILED BY GARY R. BAHR AND)
LARRY C. ROWLEY)

DOCKET NO. T-20449A-10-0081

TIME WARNER CABLE COMPANY'S MOTION TO DISMISS

Pursuant to A.A.C. R14-2-106(H) and Ariz. R. Civ. P. 12(b)(6), Respondent Time Warner Cable Information Services (Arizona), LLC, dba Time Warner Cable ("TWCIS") moves to dismiss the formal complaint filed by Gary R. Bahr and Larry C. Rowley ("Complainants") because (i) the complaint fails to state a claim upon which relief may be granted; (ii) the Commission lacks jurisdiction over the subject matter of the complaint; and (iii) the complaint is barred by the statute of limitations.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

Gary R. Bahr and Larry C. Rowley filed a formal complaint on February 2, 2010, alleging that utility companies had trenched along Silver Star Drive and failed to "return the road to the condition it was in before they trenched along and across it." Complaint p. 1. Complainants also alleged that the road is unusable as a result of the trenching and that erosion has further damaged the roadway. The trenching occurred "three plus years" ago and

Complainants have made efforts since the trenching to find a responsible party and have the road repaired. Complaint p. 2. Silver Star Drive is located in Pima County Arizona.

TWCIS is certified to provide telephone service in Arizona. However, TWCIS has no facilities, customers, trucks or plant in Pima County Arizona. Complainants have made no allegations in the complaint particular to TWCIS (or any other utility) and appear to have simply listed utility company names on the complaint with no reasonable basis for alleging that the utilities named actually undertook utility construction work on Silver Star Drive.

II. LEGAL ANALYSIS

A. The Complaint Fails to State a Claim

To survive a motion to dismiss, Complainants must include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Ariz. R. Civ. P. 8(a)(2). Such a statement is absent from the formal complaint. The complaint makes no allegation that TWCIS has facilities at this location or has ever trenched along Silver Star Drive.¹ The Complainants’ obligation to “provide the grounds of [their] entitlement to relief requires more than labels and conclusions.” *Dube v. Likins*, 216 Ariz. 406, 415, 167 P.3d 93, 111 (App. 2007) (internal citations omitted). No mention is made of Time Warner or TWCIS or Time Warner Cable in the actual complaint. Further, the Complainants seek relief from the State: “The State has the responsibility to provide for the health and welfare of its citizens. Return Silver Star Drive to the state it was in previous to the utilities trenching.” Complaint p. 1. The Complainants’ failure to lodge specific claims against TWCIS and the parallel failure to seek any relief from TWCIS compel dismissal of the complaint.

¹ As a practical matter, TWCIS does not have facilities, operations or customers in Pima County.

B. The Commission Lacks Jurisdiction

Complainants have not alleged that they are customers of any of the utilities named in the complaint, nor that their rates or services have been compromised. The allegations in the complaint sound in nuisance or tort and such claims fall outside the Commission's jurisdiction. Tort and contract claims are traditionally within the jurisdiction of the trial courts of general jurisdiction and not within the Commission's area of expertise or statutory responsibility. *Campbell v. Mountain States Tel. & Tel. Co.*, 120 Ariz. 426, 431-32, 586 P.2d 987, 992-93 (App. 1978).

C. The Claim is Barred by the Statute of Limitations

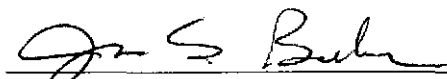
The Complainants contend that they "have been trying in vain for the last three years to get someone to recognize the damage done to [their] road and property values." A claim for negligence is barred if brought after the expiration of the applicable statute of limitation. *Montano v. Browning*, 202 Ariz. 544, 546, 48 P.3d 494, 496 (App. 2002). The statute of limitations for damage to property is two years. *Kellogg v. Willy's Motors, Inc.* 140 Ariz. 67, 70, 680 P.2d 203, 206 (App. 1984). Because Complainants did not file this complaint for three years, the claim is barred.

III. CONCLUSION

TWCIS currently has no operations or customers in Pima County. Complainants have not alleged that TWCIS owns facilities on Silver Star Drive and did not allege any fact to support a claim that TWCIS ever trenched or installed facilities on Silver Star Drive. TWCIS respectfully requests that the Commission dismiss this complaint as to TWCIS.

DATED this 24th day of March 2010.

By:



Joan S. Burke
Law Office of Joan S. Burke
1650 North First Avenue
Phoenix, Arizona 85003
Telephone: (602) 535-0396
Joan@jsburkelaw.com

Attorney for: Time Warner Cable
Information Services (Arizona), LLC,
dba Time Warner Cable.

Original and 13 copies of the foregoing
Filed this 24th day of March 2010 with
Docket Control

Original of the forgoing mailed this
24th date of March 2010 to:

Lyn Farmer, Chief Administrative Law Judge
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, AZ 95007

Janice Alward, Esq.
Chief Counsel, Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, AZ 95007

Steve Olea, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, AZ 95007

Gary Bahr
Larry Rowley
15150 W. Ajo way, #458
Tucson, AZ 85735